

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. \_\_\_\_\_

IN RE THE APPLICATION OF THE	)	
AMERICAN BOARD OF TRIAL	)	
ADVOCATES (ABOTA), MONTANA	)	
CHAPTER, SEEKING ADOPTION AND	)	MEMORANDUM IN
IMPLEMENTATION OF ABOTA'S	)	SUPPORT OF
"CIVILITY MATTERS" PROGRAMS,	)	APPLICATION INVOKING
TO INCLUDE:	)	THE ORIGINAL
	)	JURISDICTION OF THIS
(1) An ABOTA sponsored "CIVILITY	)	COURT PURSUANT TO
REFEREE/MENTOR" Program to Provide	)	SECTION VI, INTERNAL
for Civility Mentoring and Mediation	)	OPERATING RULES, TO
Assistance to members of the Bar;	)	REGULATE THE BAR OF
	)	MONTANA
(2) Adoption of the ABOTA	)	
"PRINCIPLES OF PROFESSIONALISM	)	
AND CIVILITY" as the Montana Standards	)	
of Professionalism and Civility; and	)	
	)	
(3) Amendment of the written and oral oaths	)	
of admission to the Bar of the State of	)	
Montana, requiring all applicants to swear,	)	
<i>inter alia</i> , to "faithfully observe the	)	
Montana standards of professionalism and	)	
civility . . ."	)	

This application seeks to have this Court adopt and implement an ABOTA-sponsored CIVILITY MATTERS program which consists, *inter alia*, of: (1) a CIVILITY REFEREE/MENTOR program to be undertaken by the Montana Chapter of ABOTA, (2) the Montana Standards of Civility, Integrity, and Professionalism as articulated by ABOTA, and (3) the amendment to the oaths of

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admission requiring applicant attorneys to “faithfully observe the Montana standards of professionalism and civility . . .”

Your Applicant is a member of the Bar of the State of Montana. He is also a member of the Montana Chapter of the American Board of Trial Advocates (ABOTA), a national organization of a peer-selected group of the nation’s most experienced jury trial lawyers. Petitioner and Applicant is a member of the Montana Chapter of that organization, plus is the Montana delegate to the National Board of Directors of ABOTA.

The primary purposes of ABOTA are to protect the 7th Amendment right to trial by jury in civil actions; and to promote professionalism and civility of attorneys and judges in the nation’s legal system. ABOTA prides itself on being a collegial group of jury trial attorneys who represent both plaintiffs and defendants, who have no parochial self-interest other than to make the legal profession and the public aware of the increasing importance of trial by jury, and to promote civility and professionalism among attorneys. ABOTA has also created, and maintains, a non-profit Foundation that has as its fundamental purpose the education of school children and the general public about the 7th Amendment right to a jury trial in civil actions.

The problem of increasing incivility and the lack of professionalism has been universally recognized by both members of the judiciary and the bar. As one commentator has noted:

... (W)e live in an increasing and disrespectful competitive world, and our profession is not immune from the general discourtesies that permeate society. The nature of our adversarial system of law can also foster an environment where it is often believed antisocial behavior can get you noticed and get results.

Winder & Hale, *Enforcing Civility in an Uncivilized World* (entire article attached as Exhibit “A” hereto).

ABOTA’S proposed **PRINCIPLES OF CIVILITY** provide a benchmark for establishing a framework for civility within the context of all activities of the legal profession. It is, of course, understood and appreciated that this Court has adopted Rules of Professional Responsibility to regulate attorneys and create the basis for actionable or sanctionable conduct of attorneys who are proven to have violated those Rules. However, there are no existing “rules” or “guidelines” that govern civility and professionalism. *See, Rules of Professional Conduct, Preamble, Sec. 8 (“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers” (emphasis added)).* The proposed ABOTA Principles of Civility, Integrity and Professionalism memorialize guidelines may likely assist

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lawyers in developing their individual “professional conscience.” Adoption of these principles may also likely articulate the “approbation of professional peers” by their fellow Montana lawyers.

Additionally, it is proposed that hereafter the Court include in the oath of office of all newly sworn attorneys, an additional commitment, under oath, to “. . . faithfully observe the Montana standards of Professionalism and Civility . . . (as adopted and offered by ABOTA) . . .” This change in oath has been adopted in Utah and South Carolina at the behest of ABOTA chapters in those two states. ABOTA’s Civility and Professional Committee has one of its goals to include that pledge in attorneys’ admission oaths in all 50 states. Because this proposed oath of office requires an allegiance to express standards of civility, law school teachers and bar exam schools will be required to address those standards directly and explicitly.

The program further proposes that the Montana Chapter members of ABOTA will make themselves available as a panel of unpaid, volunteer referees, and/or mentors, to mediate disputes between attorneys that arise out of issues that are related to civility and/or professionalism. It seeks to establish a simple and non-adversarial way to provide for informal resolution of civility disputes or problems that do not necessarily rise to the level of sanctionable or actionable conduct by the courts or State Bar disciplinary processes (although there obviously

could be some potential overlap). It is proposed that a court or tribunal may, in its discretion, designate an ABOTA panel member to also act as a court-appointed “master” with express authority to act on the court’s behalf or under its auspices in accordance with the rules of the court or State Bar.

The proposed program will also allow for confidential mentoring of an attorney who seeks confidential, *ex parte* advice or mentoring from an experienced ABOTA chapter member without directly involving the opposing lawyer to resolve a civility or professionalism matter which the complaining attorney initially requests not to make confrontational or adversarial. Rather, the requesting attorney may request confidential mentoring so that he/she can ultimately resolve the matter on his/her own, without the need of disclosure that advice was sought and obtained from an ABOTA panel member to assist in a self-resolution of the matter. Hence the “mentor” reference in the title of the program. However, the program allows for informal mediation between attorneys who additionally seek or agree to that assistance as well.

This will be a self-executing program which will not directly involve the courts, court personnel, judicial resources, or ABOTA financial resources.<sup>1</sup> It is

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<sup>1</sup> As is noted in the attached commentary, *Enforcing Civility in an Uncivilized World*, see Exhibit “A” hereto, the Utah Supreme Court has created a professionalism counseling program for members of the Utah Bar, in which it has chosen to involve itself, as its “. . . method in which incidents of incivility or unprofessional conduct could be reported and addressed.” *Id.* However, the Montana program chooses not to burden the courts with further bureaucracy simply for “enforcing” civility, nor does the Montana program choose to invite further adversarial disputes arising from allegedly uncivil conduct. Rather, it opts for a more self-enforcing and collegial manner by which members of the Montana Bar, using ABOTA mentors and referees, can resolve the majority of civility disputes without the involvement or intervention of the courts.

our hope that this will become an established ABOTA program that can be a significant and positive contribution to civility and professionalism within our profession and our State's justice system. The proposed program allows an ABOTA member to opt out of participation on a case-by-case basis simply by declining to accept a civility referee/mentor role in any given case, but leaving themselves available to accept requests for assistance in any other instance.

The proposed program also has guidelines which ensure that it will be invoked and used only in good faith, and that the participating attorneys will cooperate to facilitate a resolution or conclusion of the problem(s) which has been raised or alleged. Additionally, the program grants to the Referee/Mentor, and the participants, confidentiality and privilege protections, and the equivalent of judicial immunity for the Civility Referee/Mentor. It also gives a Civility Referee/Mentor complete discretion as to how he/she will handle the matter, and allows for an escape from an overly burdensome or unruly assignment. The proposed program makes it clear that it will not be considered to be an arbiter of civility disputes and there will be no public access to communications involving civility disputes.

Our Montana Chapter will publicize and discuss this program with law students at the University of Montana Law School and local bar associations in connection with presentations of ABOTA's "CIVILITY MATTERS" video and teaching programs which our national Civility Committee is presently in the

process of creating and finalizing. The Committee has developed teaching aids and other auxiliary tools to better facilitate a CIVILITY MATTERS presentation by any and all ABOTA members throughout the country. It is our hope that these videos and teaching aids will allow any ABOTA member in the country to quickly and ably make an interesting and cogent presentation to law students, bar associations, and judges' organizations. In that latter regard, we feel strongly that judges must be the primary, motivating force to effectuate a national goal that all practitioners before them honor the basic principles of civility and professionalism. It is our hope that having an ABOTA-sponsored Civility Referee/Mentor program available to all Montana lawyers will be an effective tool helping to advance those principles.

RESPECTFULLY SUBMITTED this 1st day of July, 2010.

AMERICAN BOARD OF TRIAL  
ADVOCATES, Montana Chapter

By \_\_\_\_\_  
Donald C. Robinson  
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# EXHIBIT “A”



## ENFORCING CIVILITY IN AN UNCIVILIZED WORLD

Donald J. Winder<sup>1</sup> and Jerald V. Hale<sup>2</sup>

*"That man is guilty! That man there is a slime! He is a slime! If he is allowed to go free, then something real wrong is goin' on here!"*

*"Mr. Kirkland, you're out of order."*

*"You're out of order, you're out of order! This whole trial is out of order!"*

Al Pacino as Arthur Kirkland in *And Justice for All*<sup>3</sup>

We have all seen the entertainment industry's impressions of the legal profession. Fired up attorneys in court yelling at witnesses, belittling their opponents, and battling the judge hammer and tong over every perceived slight or unfavorable ruling. Despite the artistic license entertainment writers take in creating these characters for the screen, we know all too well the caricature of the uncivil attorney has a basis in reality and in many cases is not far off the mark. We live in an increasingly disrespectful and competitive world, and our profession is not immune from the general discourtesies that permeate society. The nature of our adversarial system of law can also foster an environment where it is often believed antisocial behavior can get you noticed and get results.

But does the adversarial system necessarily require incivility on the part of the participants? Does the fact that each party enters a matter with the intent to triumph over the other side require disrespect of one's opponent? Winston Churchill did not think so. After the Japanese bombing of Singapore and Hong Kong in 1941, Winston Churchill dispatched a letter to the Japanese Ambassador announcing that a state of war existed between England and Japan. After noting the acts of aggression, Churchill's letter ended with these words: "I have the honour to be, with high consideration, Sir, Your obedient servant, Winston S. Churchill." Churchill commented in his memoirs, "Some people did not like this ceremonial style. But after all when you have to kill a man it costs nothing to be polite."<sup>4</sup> Clearly, the ability to maintain civility can be accomplished, even under the most adversarial situations.

The efforts of ABOTA have long been at the forefront of promoting civility in the legal profession. ABOTA's Principles of Civility provide the benchmark for establishing a framework for civility in all aspects of the legal profession. As a result of the efforts of ABOTA members in state and local bar associations and courts throughout the country, a quiet revolution has been taking place as bar associations and courts seek to put a greater emphasis on civility in the legal profession. Rules of civility, often based upon ABOTA's Principles of Civility, have been adopted, at least in part, in numerous jurisdictions.<sup>5</sup>

In the mid 1990's the incivility in the profession that had come to bear from the quest for "zealous" representation began to be called into question. As noted in a review article in 1994, "[z]ealous advocacy is the buzz word that is squeezing decency and civility out of the law profession. . . . [It is] the modern day plague which infects and weakens the truth finding process and makes a mockery of the lawyer's claim to officer of the court

status.”<sup>6</sup> In response to the quest for more civilized dealings in the practice of law, in 2003 the Arizona Supreme Court eliminated the obligation of attorneys to be “zealous” advocates of their clients in favor of a duty to “act honorably” in furtherance of their client’s interests.<sup>7</sup> Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon and Washington have likewise omitted all references to zealousness in their rules, preambles, and commentaries.<sup>8</sup>

In 2003, the South Carolina Bar amended its Lawyer’s Oath to include “to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.” In Utah, the Attorney’s Oath was recently modified to include a promise to “faithfully observe the Standards of Professionalism and Civility....”<sup>9</sup> It is believed that Utah is only the second state to follow the South Carolina model.

The next inevitable step in the progression toward more civility in our profession—namely, how to enforce the civility provisions that have been enacted and to which lawyers are urged to follow. While there have always been professional sanctions available for violating rules of professional conduct, is there more that should or could be done to enforce civility in the profession?

Courts around the country have entered the fray to find a way to enforce what are generally seen as non-binding suggestions on civility. For example, in the Fifth Circuit case, *In re First City Bankcorp. of Texas, Inc.*,<sup>10</sup> a “zealous” lawyer referred to opposing counsel, which included an Assistant U.S. Attorney, as a “stooge,” a “puppet,” a “deadhead,” and an “underling who graduated from a 29<sup>th</sup> tier law school.” The bankruptcy court in which the case was originally heard did not agree with the lawyer’s tactics and slapped him with a \$25,000 sanction. When the lawyer appealed to the Fifth Circuit, he argued that his behavior was an appropriate trial tactic, allowing him to recover more money for his clients and giving him the upper hand in settlement negotiations. The Fifth Circuit disagreed, and found the lawyer’s conduct to be “egregious, obnoxious, and insulting.” The \$25,000 sanction was deemed appropriate and upheld by the Court. A quick search of recent case law will reveal numerous examples where courts around the country have begun to draw lines in the sand regarding incivility in the practice of law.<sup>11</sup>

In the Utah Supreme Court case *Peters v. Pine Meadow Ranch Home Ass’n.*,<sup>12</sup> the petitioner was appealing an appellate court affirmation of a trial court’s grant of summary judgment to a homeowners’ association regarding the enforceability of its covenants, conditions, and restrictions (“CCR’s”). Rather than reach the issues raised in the appeal, the Utah Supreme Court focused on the petitioners’ briefs and the uncivilized language and tone of the briefs to affirm the holding of the lower court.<sup>13</sup> Specifically, the Court noted:

petitioners’ briefs . . . are replete with unfounded accusations impugning the integrity of the court below. These accusations include allegations, both direct and indirect, that the [Court of Appeals] panel intentionally

fabricated evidence, intentionally misstated the holding of case, and acted with improper motives. Further, petitioners' briefs are otherwise disrespectful of the judiciary.<sup>14</sup>

Rather than rule on the merits of the petitions, the Court dismissed the petition and ordered the offending attorney to pay the other side's attorney fees, which at the time had amounted to approximately \$17,000. In sum, the Court noted if attorneys continue to adopt the "scorched earth" approach to advocacy, they do so at their own peril. In choosing to disregard the petitioners' briefs, the *Peters* Court relied on Rule 24 (k) of the Utah Rules of Appellate procedure which provides:

[a]ll briefs under this rule must be . . . free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, . . . and the court may assess attorney fees against the offending lawyer.<sup>15</sup>

Further, in arriving at its decision the Court noted the Utah Standards of Professionalism and Civility<sup>16</sup> as well as Rule 8.2 of the Utah Rules of Professional Conduct which provides "[a] lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge . . . ."<sup>17</sup>

Following up on the issue of enforcement of civility, the Utah Supreme Court has created what is believed to be the first program in the country of professionalism counseling for members of the Utah Bar.<sup>18</sup> Specifically, the program functions through a board of five counselors, appointed by the Utah Supreme Court, who generally counsel and educate members of the Bar concerning the Standards of Professionalism and Civility. The Court recommended the counselors would serve a four-fold purpose: (1) to counsel members of the Bar in response to complaints by other lawyers or referrals from judges; (2) to provide counseling to members of the Bar who request advice on their own obligations under the Standards of Professionalism and Civility; (3) to provide CLE on the Standards; and (4) to publish advice and information relating to the work of the counselors. Of these functions, it is the counseling function, which is most critical to the notion of enforcing civility in the profession.

The goal is to provide a method in which incidents of incivility or unprofessional conduct could be reported and addressed. The focus, however, would not be punitive in nature, but rather, educational. In responding to a complaint from a fellow attorney or judge, the counselors may issue a written advisory to the offending lawyer, or may simply counsel with the lawyer in a personal meeting, with the goal of educating the offending lawyer as to alternative modes of practice in harmony with the Standards. In conjunction with this direct contact with offending attorney, the counselors would publish an annual report concerning the Standards it has interpreted, as well as periodically publishing selected portions of its advisories in the Utah Bar Journal for the benefit of practicing lawyers.

ABOTA has long championed civility and it appears that both bar associations and courts are ready to step in and force the issue where efforts at self-policing have apparently failed to achieve the desired results. Every ABOTA Chapter should urge their respective states to: 1) adopt principles of civility, 2) modify attorney's oaths to eliminate "zealous" advocacy and require adherence to principles of civility, 3) establish judicial precedence enforcing those principles, and 4) create a counseling program. As recognized by the Utah Supreme Court, education is the key component to any successful effort to enforce civility. As attorneys learn what is expected in the practice of law, the "culture of belligerence,"<sup>19</sup> like the typewriter and carbon paper, will become a relic of a bygone era.

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<sup>1</sup>Don Winder is managing partner in the firm Winder & Counsel, PC, Salt Lake City, Utah. Mr. Winder has practiced for over 35 years and he has a varied trial practice focusing on business litigation. He is a proud member of ABOTA. Mr. Winder has also been privileged to serve on the Utah Supreme Court Committee on Professionalism, tasked with developing the Utah Standards of Professionalism and Civility, modifying the Attorney's Oath and recommending the establishment of a program of professionalism counseling for members of the Utah Bar.

<sup>2</sup>Jerry Hale is an associate with Winder & Counsel, PC. Mr. Hale has practiced for over eight years and also has a varied trial practice.

<sup>3</sup>Valerie Curtain & Barry Levinson, *And Justice for All*, Columbia Pictures, 1979.

<sup>4</sup>Churchill, Winston S., *Memoirs of the Second World War*, Boston, Houghton Mifflin, 1959.

<sup>5</sup>Some, but certainly not all, of these jurisdictions include Arizona, California, Florida, Georgia, Texas, Utah and even the San Diego County Bar Association.

<sup>6</sup>Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not go away*, 77 Marq. L. Rev. 751, 767 (1994).

<sup>7</sup>See Ariz. R. S.Ct. 42.

<sup>8</sup>See Indiana Rules of Professional Conduct, [www.in.gov/judiciary/rules/prof\\_conduct/index.html](http://www.in.gov/judiciary/rules/prof_conduct/index.html); Louisiana Rules of Professional Conduct, [www.lsba.org/2007/memberservices/codeofprofessionalism.asp](http://www.lsba.org/2007/memberservices/codeofprofessionalism.asp); Montana Rules of Professional Conduct, [www.montanabar.org/associations/7121/files/ethicsrulecomparison.pdf](http://www.montanabar.org/associations/7121/files/ethicsrulecomparison.pdf); Nevada Rules of Professional Conduct, [www.leg.stat.nv.us/courtrules/rpc.html](http://www.leg.stat.nv.us/courtrules/rpc.html); New Jersey Rules of Professional Conduct, [www.judiciary.state.nj.us/rpc97.htm](http://www.judiciary.state.nj.us/rpc97.htm); Oregon Rules of Professional Conduct, [www.osbar.org/docs/rulesregs/orpc.pdf](http://www.osbar.org/docs/rulesregs/orpc.pdf); Washington Rules of Professional Conduct, [www.courts.wa.gov/rules/?fa=court\\_rules.list&group=ga&set=rpc](http://www.courts.wa.gov/rules/?fa=court_rules.list&group=ga&set=rpc).

<sup>9</sup>Found in the preamble: A Lawyer's Responsibilities, Utah Supreme Court Rules of Professional Conduct.

<sup>10</sup>282 F.3d 864 (5th Cir. 2002).

<sup>11</sup>See e.g., *GMAC Bank v. HTFC Corp*, No. 06-5291 (E.D. Penn. Filed February 29, 2008) (attorney sanctioned \$13,026.00 for actions during deposition described as hostile, uncivil and vulgar); Steven Kreytak, *Lewd Gesture Gets Lawyer 90 Days in Jail*, Austin American Statesman, April 17, 2008; *Hagen v. Faherty*, 66 P.3d 974, 979-80, (Ct. App. NM 2003) (court admonishes attorneys for uncivil behavior in briefs, bemoaning "culture of belligerence" that has taken root in legal system).

<sup>12</sup>151 P.3d 962 (Utah, 2007).

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<sup>13</sup>*Id.* at 962.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 964.

<sup>16</sup>Standard 3 of the Utah Standards of Professionalism and Civility (“USPC”) provides, “[l]awyers shall not, without an appropriate factual basis, attribute to . . . the court improper motives, purpose or conduct.” Standard 1 of the USPC provides, “lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.” [www.utcourts.gov/courts/sup/civility.htm](http://www.utcourts.gov/courts/sup/civility.htm).

<sup>17</sup>151 P.3d at 964.

<sup>18</sup>*See* Utah Supreme Court Standing Order No. 7, issued January 9, 2008, effective April 1, 2008; <http://www.utcourts.gov/resources/rules/urap/Dupctso.htm#7>.

<sup>19</sup> *See* Hagen v. Faherty, *Supra*, 66 P.3d at 979-80.

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October 7, 2008  
ABOTA

Bcc: DJW  
JER  
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